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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, AND SOUTHERN RAILWAY COMPANY, *Petitioners,*

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

CASES: Page

Abbott Laboratories *v.* Gardner, 387 U.S. 136 (1967) .. 9

City of Chicago v. United States, 396 U.S. 162 (1969).. 10

Holloway v. Bristol-Myers Corp., No. 71-1479 (D.C. Cir., July 26, 1973) 2, 3, 16

National Railroad Passenger Corp. (Amtrak)—Proposed Discontinuance of Trains Nos. 30 & 31, 530 & 531—Between New York, New York/Washington, D. C., and Kansas City, Missouri (National Limited), F.D. No. 27436 10

National Railroad Passenger Corp. (Amtrak)—Proposed Discontinuance of Trains Nos. 52 & 53 Between Chicago and St. Petersburg/Miami, Florida (The Floridian), F.D. No. 27437 10

Potomac Passengers Ass'n v. Chesapeake & O. Ry., 475 F.2d 325 (D.C. 1973) 5, 7

STATUTES:

Communications Satellite Act of 1962, Section 403 (47 U.S.C. § 743) 8

Federal Food, Drug, and Cosmetic Act, Section 701(f)(6) (21 U.S.C. § 371(f)(6)) 9

Federal Trade Commission Act (15 U.S.C. § 41, et seq.) 2, 3, 4

Interstate Commerce Act, Section 13a (49 U.S.C. § 13a) 5, 10

Rail Passenger Service Act of 1970 (45 U.S.C. § 501 et seq.)

Section 101 (45 U.S.C. § 501) 2
Section 202 (45 U.S.C. § 522) 7, 8
Section 307 (45 U.S.C. § 547) 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17
Section 404 (45 U.S.C. § 564) 10

28 U.S.C. § 1337 (1970) 9

Page

MISCELLANEOUS:

Congressional Record Vol. 116 (1970) 11, 12, 13

H.R. Rep. No. 91-1580, 91st Cong., 2d Sess. (1970) 13

S. Rep. No. 91-765, 91st Cong., 2d Sess. (1970) 11

Supplemental Hearings on H.R. 17849 and S.3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Serial 91-62 (1970) 7, 11, 13, 14, 15

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REPLY BRIEF FOR PETITIONERS

Few points presented by the Brief for Respondent require a response:

1. Respondent asserts that individuals who benefit from a statute have a right to sue for its enforcement and that implying a private right of action under

the Amtrak Act will aid in implementation of the Act. Brief for Respondent at 20, 27. The opposite is true, because of the disabling effect that allowing such suits would have. The Act was passed for the general public benefit, not only to prevent the disappearance of intercity rail passenger service but to promote and improve such service and thus to establish a balanced national transportation system. 45 U.S.C. § 501 (1970). This would not come about through a series of individual suits in various courts throughout the country.

In the recent case of *Holloway* v. *Bristol-Myers Corp.*, No. 71-1479 (D.C. Cir., July 26, 1973), the United States Court of Appeals for the District of Columbia, through a different panel than the one which rendered the opinion below, considered a question similar to that presented here and refused to imply a private right of action to enforce the Federal Trade Commission Act. In *Holloway*, the plaintiffs argued that, as consumers, they were within the group intended to be protected by the Act and that only through private rights of action could they be protected against false advertising. They urged that a private right of action should be implied from the existence of

> (1) a Federal statutory or constitutional prohibition against the acts complained of; (2) inclusion of the defendant in the class upon which the duty of statutory compliance has been imposed; (3) legislative intent to place the party claiming injury within the ambit of the statute's protection or to confer a substantive benefit or immunity upon him; (4) injury or threatened harm proximately resulting from the defendant's breach of duty; and (5) unavailability or ineffectiveness of alternative avenues of redress. [Slip Opinion at 5.]

The court held that these conditions were necessary but not sufficient to support implication of a private right of action. The court recognized that the statutory prohibition of false advertising was for the public benefit but concluded that Congress had intended that this public benefit would be best protected by vesting a specialized administrative agency, and not private individuals, with responsibility to enforce the Act. For reasons equally applicable to this case, the court held that private enforcement of the Act would seriously interfere with the enforcement activities of the Federal Trade Commission. The court stated that

> [j]udicial implication of ancillary Federal remedies is a matter to be treated with care, lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently. [*Id.* at 6.]

The court envisioned that judicially engrafting a private right of action could result in "vexatious litigation" which would impede the public enforcement of the Act by the Federal Trade Commission:

> Private litigants are not subject to the same constraints. They may institute piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program. The consequence would burden not only the defendants selected but also the judicial system. It was to avoid such possibilities of lack of coherence that Congress focused on the FTC as an exclusive enforcement authority. [*Id.* at 23.]

We urge that respondent's argument be rejected for the same reason that the court in *Holloway* v. *Bristol-Myers, supra,* rejected such an argument. The Court

of Appeals, in deferring to the judgment of Congress in selecting the Federal Trade Commission to enforce the Act, said that

> [w]e are considering an Act in which ends and means, the social ends to be fostered and the administrative means of achieving those objectives, are inseparably interwoven into a unified and comprehensive statutory fabric. Both are the product of a legislative balance which took into account not only consumer protection but also interests of the businesses affected, with particular concern for tempered enforcement, the orderly development of commercial standards, and freedom from multiplicious litigation. [*Id.* at 22.]

2. Respondent states that the Attorney General has advised by letter "that he has no power under the Act 'to sue for a construction of the [Amtrak] Act or to enjoin a purely technical violation.'" Brief for Respondent at 23. This quotation, which respondent has taken out of context, misrepresents the position of the Attorney General.

In his letter of November 19, 1971, Assistant Attorney General L. Patrick Gray, III, informed Congressman John Slack of West Virginia that after study and consultation with the Department of Transportation, the Department of Justice had concluded not to initiate proceedings to compel the restoration of certain rail service discontinued by the Baltimore & Ohio Railroad. Appendix to Brief for Respondent at 29-31. The Assistant Attorney General noted that the Baltimore & Ohio Railroad asserted that the subject trains were "intercity" in nature. If so, then discontinuance was admittedly lawful under the Amtrak Act. If, however, the trains were actually "commuter" trains, discontinuances could be made only according to Section 13a of

the Interstate Commerce Act,[1] and plaintiffs would have an appropriate remedy for violation of *that* Act at the ICC or in federal court. In either case, no violation of the *Amtrak* Act was involved, and therefore neither case was "a proper one for intervention by the Justice Department." *Id.* at 31. It was this distinction between an action involving a violation of the Amtrak Act and an action not involving a violation of the Amtrak Act[2] which the Assistant Attorney General correctly recognized and referred to when he stated that

> the statutory mandate of section 307(a) does not give the Attorney General the authority to sue for a construction of the Act or to enjoin a purely technical violation. [*Id.* at 30 (footnote omitted).]

In the footnote to this statement, the Assistant Attorney General indicated what he meant by "technical violation":

> Any suit to halt discontinuance would, at most, turn into a technical struggle over the inclusiveness of the statutory term "commuter train". Such a determination would serve no useful purpose and would not serve to enhance and protect the statutory scheme of the Act, which is the only mandate the Attorney General has thereunder [*Id.*]

Certainly it has never been questioned, as the Assistant Attorney General recognized in his letter, that the

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[1] Railroads may alternatively seek authorization for train discontinuances from the appropriate state regulatory agency. However, this procedure is lengthy and cumbersome because it requires numerous hearings. As a result, railroads almost always choose to follow the Section 13a procedure.

[2] This is exactly the distinction drawn by the Court of Appeals in its *Potomac Passengers Ass'n* opinion, which allows private parties to sue railroads for a declaratory judgment that certain discontinued trains are commuter, not intercity. *Potomac Passengers Ass'n* v. *Chesapeake & O. Ry.*, 475 F.2d 325 (D.C. Cir. 1973).

Attorney General has authority to bring suit whenever Amtrak or any other railroad, in the words of the Act,

> engages in or adheres to any action, practice or policy inconsistent with the policies and purposes of this [Act], obstructs or interferes with any activities authorized by this [Act], refuses, fails or neglects to discharge its duties and responsibilities under this [Act], or threatens any such violation, obstruction, interference, refusal, failure, or neglect * * *. [45 U.S.C. § 547(a) (1970).]

When read in context, the statements made in the letter of November 19, 1971, by the Assistant Attorney General are consistent with the more recent letter of September 6, 1972, from the Acting Assistant Attorney General, E. Grey Lewis, which states that it is the position of the Department of Justice that "in non-labor agreement cases, Section 307 of the Act, 45 U.S.C. 547, reserves to the Attorney General the exclusive right to sue Amtrak or any railroad for actual or threatened violation of the policies and provisions of the Act." Appendix E to Petitioners' Petition for a Writ of Certiorari at 42a. This position of the Department of Justice has recently been reaffirmed by the Solicitor General. Memorandum for the United States as Amicus Curiae at 5.[3]

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[3] Respondent also accuses petitioners of taking out of context the testimony of Anthony Haswell, formerly President of respondent, at hearings on the Amtrak Act. Brief for Respondent n.51 at 23. Respondent contends that Mr. Haswell's remarks were directed only to the issue of whether other federal agencies should have control of Amtrak's service. But Mr. Haswell did not so state. His comments were in answer to a question as to whether there were any controls on the service of Amtrak. Mr. Haswell expressed agreement with the method of enforcement provided in the Act and confidence that Congress would continue to re-

3. Respondent argues that there have been massive discontinuances of train service under the Amtrak Act. Brief for Respondent at 3, 10. To make this argument, it relies upon cases such as *Potomac Passengers Ass'n* v. *Chesapeake & O. Ry., supra*,[4] which the Court of Appeals characterized as an action for a declaratory judgment that certain trains were "commuter" rather than "intercity." These cases properly involve not alleged violations of the Amtrak Act, which does not govern commuter trains, but rather alleged violations of the Interstate Commerce Act, which does. Since these cases do not raise the possibility of a violation of the Amtrak Act, they are irrelevant to the issue before the Court in this case—that is, what parties may bring an action under Section 307 to enjoin a violation of the Amtrak Act.

4. Respondent notes that "[w]hen Congress wanted to exclude judicial review in [the Amtrak Act], it expressly said so, as in Section 202 of the Act, where it precluded judicial review of the basic system prescribed by the U.S. Secretary of Transportation." Brief for Respondent at 18. Petitioners do not dispute this statement. However, the present case involves not the

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assess Amtrak's operation. He stated that he was not concerned about lack of control,

> either in the statute itself, enforceable by the courts, or in the hands of some other agency. I am certain, if, after the first year, we are not getting the results that we want along these lines, the Congress will take a very thorough look. [Supplemental Hearings on H.R. 17849 and S. 3706 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., ser. 91-62, at 178 (1970) (hereinafter cited as "Supp. Hearings").]

[4] The decision in the *Potomac Passengers Ass'n* case was not appealed, and the correctness of that decision is not before the Court.

right of aggrieved persons to seek judicial review of administrative decisions, but rather the much different right of such persons to commence original injunctive actions in the District Courts. The only relevance of Section 202 to the Section 307 issue in this case is that both provisions are part of a carefully balanced scheme by which Congress sought to preserve and restore intercity railroad passenger service. In setting up this scheme, Congress placed responsibility on selected government officials, whose experience and expertise it deemed vital to survival of the National Railroad Passenger Corporation. And Congress intentionally restricted the ability of private individuals to obstruct or delay the Congressional scheme by initiating judicial review or filing private rights of action for personal motives of their own.[5]

Moreover, respondent's reliance upon Congress's ability to express its intentions clearly points up a basic internal inconsistency in the analysis of both respondent and the Court of Appeals. For if it is assumed that Congress says precisely what it means, why is it that the Amtrak Act is silent with regard to whether any aggrieved person can bring an action under the Act? If Congress had intended to provide a right of action for all injured and aggrieved persons, would it not have so stated in a specific provision rather than leaving such a right to be "implied" from the general

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[5] Respondent also claims that there is no Congressional intent to bar suits against Comsat under Section 403(a) of the Comsat Act. Brief for Respondent at 27. However, no court has made such a determination. Moreover, the public seems to disagree with respondent's interpretation of Congressional intent, because no actions have been filed under Section 403(a) of the Comsat Act.

purposes of the Act? SA 45.[6] It is certainly inconsistent to argue, as the Court of Appeals did (SA 38) that "Congress could just as easily have made clear its desire to limit the right to seek review" by inserting the word "only" in the Act, and then to assert that Congress did not make clear its desire to grant a private right of action but instead left that important matter to "implication" from the Act as a whole. And even if Congress for some reason did not wish to provide specifically for the cause of action claimed here, surely it could have used general language similar to that in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(f)(6): "The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law." The Congress was aware that the Court had found this kind of language persuasive in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 144 (1967).

5. Respondent points out that the title of Section 307 of the Amtrak Act, as printed in the United States Code and in the Brief for Petitioners, is at variance with the title of Section 307 as enacted. Brief for Respondent at 2. Respondent is correct. Evidently, the codifier interpreted the word "Sanctions," which is the title of Section 307 as enacted, to mean "Jurisdiction of the District Courts of the United States to Impose Sanctions," which is the title of Section 307 repro-

[6] Agreeing with part of petitioners' argument, the Court of Appeals held that 28 U.S.C. § 1337 (1970) only permits jurisdiction but does not create a cause of action. SA 45. The Court did *not* find that Section 307 of the Amtrak Act gives all aggrieved persons a cause of action. Rather, the Court implied the existence of such a right of action from what it considered to be the general purpose of the Act, namely, the protection of railroad passengers. SA 45-46.

duced in the United States Code. However, the *text* of Section 307 as enacted by Congress appears verbatim in the Code and in petitioners' brief, and petitioners stand on all arguments in their main brief premised on that statutory language.

6. Respondent implies that passengers will be subjected to massive discontinuances of railroad services for which they will have no remedy if the Court fails to find that a private right of action exists under Section 307. Brief for Respondent at 3, 6, 11-12. There is no basis whatever for believing that this dire prediction will materialize. Respondent ignores the fact that the traditional remedy of review of discontinuances is still available for all lines which are part of the basic system. The Amtrak Act provides that after July 1, 1973, no passenger train service in the basic system may be discontinued except in compliance with Section 13a of the Interstate Commerce Act, which authorizes railroads to petition the Interstate Commerce Commission for permission to discontinue passenger trains. 45 U.S.C. § 564(b)(3) (1970). Passengers may seek judicial review of Interstate Commerce Commission orders allowing discontinuances made pursuant to this Section. *City of Chicago* v. *United States,* 396 U.S. 162 (1969). The basic system includes most of Amtrak's intercity service, as respondent acknowledges. Brief for Respondent at 20 n. 44. Of the five discontinuances of intercity service attempted by Amtrak since its inception, three were of basic system service,[7] and two were not.

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[7] Amtrak has withdrawn two of the three applications for discontinuances of basic system service it filed with the Interstate Commerce Commission. *See National Railroad Passenger Corp. (Amtrak)—Proposed Discontinuance of Trains Nos.* 30 & 31, 530 & 531—*Between New York, New York/Washington, D. C., and Kansas City, Missouri* (*National Limited*), F.D. No. 27436; *Na-*

Consequently, the implication that failure of the Court to imply a private right of action under Section 307 will result in massive discontinuances not subject to judicial review is without foundation.

7. Respondent seriously misrepresents that the Amtrak Act was rushed through Congress and passed the final day before adjournment. Brief for Respondent at 7-8, 13.

Congress first began to deal with the deterioration of passenger service in 1958—fifteen years ago—but at that time no solution was apparent. 116 Cong. Rec. 36895 (1970) (remarks of Senator Allott). As early as 1961, serious consideration was given by a Senate Commerce Committee staff study (the "Doyle Report") to placing responsibility for such service upon a private corporation established by Congress. S. Rep. No. 91-765, 91st Cong., 2d Sess. 89 (1970). On April 9, 1970, the Senate Commerce Committee, after three days of hearings on rail passenger service, gave a favorable report to S.3706, which essentially proposed federal subsidies for revitalization of rail passenger service. *Id.* at 6. In its report, the Committee recognized that one solution to the problem of deteriorating rail passenger service could be a federal corporation or a quasi-public corporation to operate passenger trains. *Id.* at 5. Senator Prouty, who voted with the majority of the Committee to report S.3706, submitted an alternative draft to S.3706. This draft, which proposed creation of a

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tional Railroad Passenger Corp. (Amtrak)—Proposed Discontinuance of Trains Nos. 52 & 53 Between Chicago and St. Petersburg/Miami, Florida (The Floridian), F.D. No. 27437.

Rail Passenger Corporation, was in basic form the bill which was eventually enacted as the Amtrak Act. *Id.* at 76-88.

When the rail passenger service bill was called for Senate floor debate on May 5, 1970, Senator Prouty's proposal was offered as a substitute. In the debate, Senator Magnuson, Chairman of the Commerce Committee, explained that he offered Senator Prouty's proposal as a substitute because the Committee had finally been notified of administration support for a national rail passenger service corporation. 116 Cong. Rec. 14160 (1970). He stated that

> * * * the committee chairman and the subcommittee chairman who supported the reporting of S. 3706 have joined with their counterparts from across the aisle to sponsor a substitute for the reported bill. This is not a course taken lightly. * * * We pointed out, however [in the report on S. 3706], that the committee was not convinced that that legislation (S.3706) represented the only possible answer to the problem. * * *
>
> A few days after the report was filed, the Secretary of Transportation, in meetings with Senators Cotton, Hartke, Prouty, and me, notified us that at long last he had been authorized to express administration support for a national corporation approach. [Id.]

Senator Prouty's proposal was passed by the Senate on May 6, 1970, by a vote of 78 to 3, after two days of extensive debate. 116 Cong. Rec. 14160-178, 14269-283, 14285-287 (1970).

Senator Prouty's proposal was considered in hearings on June 2, 3, and 4, 1970, by the House Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce. During these three days of hearings, seventeen witnesses appeared before the Subcommittee, and fourteen organizations, individuals, and departments submitted additional material for the record.

H.R. 17849, reported favorably by the House Committee on October 7, 1970, was, with minor amendments, the same bill as S.3706—Senator Prouty's proposal—passed by the Senate on May 6. H.R. Rep. No. 91-1580, 91st Cong., 2d Sess. 2 (1970). H.R. 17849 was passed by the House on October 14, 1970, after two days of debate. 116 Cong. Rec. 36594-600, 36655-664 (1970). On the same day the Senate considered and passed H.R. 17849, which was explained to the Senate as being essentially the same bill as S.3706, approved by the Senate five months earlier. 116 Cong. Rec. 36894-895 (1970).

Thus, the passage of the Amtrak Act by Congress can hardly be described as rushed. This characterization is refuted by the study given to the proposal of a national railroad passenger corporation as early as 1961 in the "Doyle Report" and the preparation and negotiations which culminated in the passage of S.3706 by the Senate in May 1970. As set out above, this proposal, agreed upon by various associations, departments, labor, and the sponsors of the bill was, with minor amendments, the same bill which was passed by the House in October 1970 after hearings and lengthy debate.

8. Respondent claims that petitioners are mistaken in stating that Section 307, as redrafted by the House

Interstate and Foreign Commerce Committee and as enacted, is in "exact conformity" with the recommendations of Secretary of Transportation Volpe.[8] Brief for Respondent at 15. Respondent's claim is in error. The suggestions of Secretary Volpe which respondent claims the Committee rejected had nothing to do with the issue of who could bring an action under Section 307. Rather, they were directed to whether railroads, as well as Amtrak, could *be* sued.

The draft of Section 307 being considered by the Committee provided that the District Courts would have jurisdiction to hear actions against Amtrak, but not against other railroads, "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby * * *." Supp. Hearings at 44. At the hearings two amendments to Section 307 were proposed by witnesses speaking for organized labor. The first

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[8] Respondent asserts that in the Brief for Petitioners

> for the first time, Amtrak and the railroads advance the contention that an intention by Congress to exclude private parties from the courts may be inferred by "acceptance of an Executive Branch recommendation" made by "the administrative officer charged with administration of the Act", in this case the U.S. Secretary of Transportation, John A. Volpe. [Brief for Respondent at 15].

This charge is false. Petitioners have repeatedly made the argument that the Congress followed the recommendation of Secretary Volpe in rejecting the proposed amendment to allow any person to sue under Section 307. *See* Brief for Appellees Central of Georgia Railway Company and Southern Railway Company in the Court of Appeals at 8; Brief and Appendix for Appellee National Railroad Passenger Corporation in the Court of Appeals at 24-25; and Petitioners' Petition for a Writ of Certiorari at 15-16.

amendment would amend Section 307 to allow actions against all railroads as well as Amtrak. The second amendment proposed at the hearings bears directly on the issue in this case. This amendment would have allowed "any aggrieved party, including employee representatives," to bring an action under Section 307. Supp. Hearings at 134. Secretary Volpe, at the request of the Committee, submitted his views on the two proposed amendments, and the bill as enacted followed his recommendation exactly concerning who should be allowed to bring an action under Section 307. Secretary Volpe agreed that railroad employees and their representatives should be entitled to sue under Section 307, and the Committee amended the bill to allow these suits. However, Secretary Volpe drew the line at permitting "any person" to sue, and the Committee complied with his objection.[9]

9. Respondent expresses dissatisfaction with the way Amtrak is running its railroads. Brief for Respondent at 24 n. 53. It argues that Amtrak should provide a better choice of routes for winter vacationers and should not "by-pass" certain places. For example, Amtrak should not "bypass the spectacularly scenic Colorado Rockies west of Denver." *Id.* Respondent attacks the quality of service and the on-time performance of Amtrak, as well as the "non-cooperation" of other railroads. *Id.*

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[9] Even Secretary Volpe's comments with regard to whether the bill should allow all railroads to *be* sued were not at variance with the Committee's action. Secretary Volpe simply said he was not sure it was *necessary* to make sanctions under this Act applicable to all railroads, but he did not declare that he was *opposed* to that inclusion.

We believe that nothing could better demonstrate the quagmire the courts would enter if this case is affirmed than these assertions by respondent. Respondent would have the courts "come to grips with [the] fundamental problems" of running a railroad (*id.*), but that is not the function of the courts under the statute. Burdening the courts with decisions in regard to the day-to-day operations of Amtrak at the request of every dissatisfied passenger is not in the interests of the judicial system or the legislative scheme carefully designed to preserve intercity rail passenger service for the benefit of the general public. The Court of Appeals, in deciding *Holloway* v. *Bristol-Myers, supra,* rejected a similar claim that the Federal Trade Commission, "because of insufficient staff and competing demands in other spheres of its jurisdiction, * * * is simply unable to provide effective enforcement in the field of false advertising." *Id.* at 28. The Court of Appeals in *Holloway* deferred to the judgment of Congress that the Federal Trade Commission was the proper agency to enforce the statutory prohibition of false advertising.

In passing the Amtrak Act, Congress was aware that embroiling the newly created corporation in unlimited litigation would be destructive to Amtrak's limited resources and to the Congressional purpose of preventing the disappearance of intercity rail passenger service. To this end Congress chose to minimize litigation by making the Attorney General the watchdog of the public interest. Allowing private suits under Section 307 would upset this Congressional scheme and would make the courts train dispatchers, train masters, and stationmasters. Petitioners urge the Court to avoid this

dilemma by refusing to imply a private right of action under Section 307.

Respectfully submitted,

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